STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Jessica R. Cooper, Richard A. Bandstra, and Michael J. Talbot

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

DANIEL BRAYMAN

Defendant-Appellee.
_____/

Supreme Court No. 123555

Court of Appeals No. 227942

Lower Court No. 99-4731

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BRIEF ON APPEAL – DEFENDANT-APPELLEE
(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellee agrees that the Plaintiff-Appellant's statement of jurisdiction is correct.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT MR. BRAYMAN CANNOT BE CONVICTED OF MANSLAUGHTER WHERE HE DID NOT NEGLIGENTLY PERFORM A LAWFUL ACT, NEGLIGENTLY FAIL TO PERFORM A LEGAL DUTY, OR PERFORM A NON-FELONIOUS, NON-INHERENTLY DANGEROUS UNLAWFUL ACT?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

A. WHETHER THIS COURT ULTIMATELY DECIDES TO CHANGE THE LAW, MAY IT APPLY THOSE CHANGES RETROACTIVELY TO MR. BRAYMAN, AS THE CHANGES WOULD BE UNEXPECTED AND INDEFENSIBLE BY REFERENCE TO THE LAW AT THE TIME OF THE ACTS IN QUESTION HERE?

Court of Appeals made no answer.

Defendant-Appellant answers, "No".

B. WAS INVOLUNTARY MANSLAUGHTER AN INAPPROPRIATE CHARGE AT THE TIME OF THE ACTS IN QUESTION HERE BECAUSE THE LAW DELINEATED THE OFFENSE INTO THREE DISTINCT CATEGORIES: GROSS NEGLIGENCE MANSLAUGHTER REQUIRED A LAWFUL ACT; MISDEMEANOR-MANSLAUGHTER REQUIRED NON-FELONIOUS, NON-INHERENTLY DANGEROUS CONDUCT; AND "FAILURE TO ACT" MANSLAUGHTER REQUIRED THE EXISTENCE OF A LEGAL DUTY?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellee accepts Plaintiff-Appellant's Statement of Facts, adding only the following procedural history. On March 14, 2000, Defendant-Appellant Daniel Brayman was convicted by a jury of one count of manslaughter (MCL 750.321) and two counts of poisoning drink (MCL 750.436) before Wayne County Circuit Judge Maggie W. Drake. On March 30, 2000, Judge Drake sentenced him to imprisonment for 5 years 9 months to 15 years for manslaughter and 2 years 6 months to 5 years for poisoning. Mr. Brayman appealed by right. His appeal was consolidated with that of co-defendants Joshua Cole, Nicholas Holtschlag, and Erick Limmer.

On March 27, 2003, the Court of Appeals vacated Limmer's conviction for accessory after the fact to manslaughter and vacated the manslaughter convictions of the other three defendants for insufficient evidence, holding that the defendants could not be convicted of manslaughter for an unlawful act if that act was a felony. (20a). The Court of Appeals further held, however, that there was sufficient evidence of poisoning, (17a-18a), denied relief on the evidentiary issues raised, (20a-29a), and did not address the sentencing issues as moot, given its holding on the manslaughter convictions. (20a, 29a). The prosecution timely filed an application for leave to appeal, seeking expedited consideration.

On July 3, 2003, this Court granted the prosecution's application for leave to appeal, consolidated the case with that of the co-defendants, and denied Mr. Brayman's application for leave to appeal. (10a-11a).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MR. BRAYMAN CANNOT BE CONVICTED OF MANSLAUGHTER WHERE HE DID NOT NEGLIGENTLY PERFORM A LAWFUL ACT, NEGLIGENTLY FAIL TO PERFORM A LEGAL DUTY, OR PERFORM A NON-FELONIOUS, NON-INHERENTLY DANGEROUS UNLAWFUL ACT.

Manslaughter is a statutory offense. MCL 750.321. But, as it is not defined by statute, its definition comes from the common law. People v Herron, 464 Mich 593, 604 (2001). The "common law" is not a uniform, static, or monolithic expression of "the law." "Common law" necessarily describes an ever-evolving body of jurisprudence, that grows as human understanding grows. Thus, how something is defined by common law necessarily means how it was defined in the common law **at a particular point in time**. Courts can change the law, adding to what constitutes the common law, but at least in terms of remedy to the parties, what matters in a criminal case is what the common law was **at the time of the alleged offense**. Any rational theory of responsibility must consider the legality of an act with respect to the law at the time of that act. From Mr. Brayman's perspective, this case is not about whether the law should be changed to address perceived gaps in coverage for certain homicide offenses. In fairness, however, if this Court chooses to do so, it should recognize that what it is doing is changing the law, and it should not penalize Mr. Brayman for an offense which, at the time in question, did not apply to his conduct.

The prosecution sets forth a very passionate case for why the law of manslaughter should be other than it is. Be that as it may, its view of the law was not in effect at the time of the acts here. Due Process and Ex Post Facto concerns prevent this Court from retroactively applying that version of the law to Mr. Brayman.

A. **WHETHER THIS COURT ULTIMATELY DECIDES TO CHANGE THE LAW, IT MAY NOT APPLY THOSE CHANGES RETROACTIVELY TO MR. BRAYMAN, AS THE CHANGES WOULD BE UNEXPECTED AND INDEFENSIBLE BY REFERENCE TO THE LAW AT THE TIME OF THE ACTS IN QUESTION HERE.**

Ex post facto laws are prohibited under both the state and federal constitutions. US Const, art I, §§ 9, 10; Const 1963, art I, § 10. As succinctly recited by this Court in People v Marshall, 362 Mich 170, 174 (1961), "It is a basic proposition in a constitutional society that crimes should be defined in advance, and not after action has been taken." (quoting Gellhorn, American Rights, 85, 86). A legislative act which retroactively subjects to punishment someone who was not then subject to that punishment at the time of the offense violates this prohibition. Stogner v California, ___ US ___; 123 S Ct 2446, 2451; 156 L Ed 2d 544 (2003).

The Ex Post Facto Clause does not apply directly to judicial decisions. Rogers v Tennessee, 532 US 451; 121 S Ct 1693; 149 L Ed 2d 697 (2001); Marks v United States, 430 US 188; 97 S Ct 990; 51 L Ed 2d 260 (1977). However, ex post facto principles apply to judicial acts through the Due Process Clause, as judicial construction of a statute can have precisely the same effect. US Const, Am XIV; Marks, 430 US at 191; Bouie v City of Columbia, 378 US 347, 353; 84 S Ct 1697; 12 L Ed 2d 894 (1964). A judicial construction of a statute which subjects one to criminal liability for past conduct may not be applied retroactively if that construction is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue . . . .' " Bouie, 378 US at 354 (quoting Hall, General Principles of Criminal Law (2d ed), p 61).

Similarly, the state constitution embodies ex post facto principles as part of its guarantee of due process of law. Const 1963, art I, § 17; People v Stevenson, 416 Mich 383 (1982); People v

Dempster, 396 Mich 700, 714-718 (1976). Notably, this protection guards against more than just an accused's subjective reliance on the law: "The ex post facto principle also protects against erratic or arbitrary action improper in a lawgiver." Stevenson, 416 Mich at 398.

If this Court were to adopt the appellant's view of the law of manslaughter, namely to blur the legal categories of involuntary manslaughter and to expand the "misdemeanor-manslaughter" to include inherently dangerous felonies, retrospective application would be prohibited. As set forth in more detail below, for at least eighty years, this Court has understood involuntary manslaughter in terms of three conceptually distinct categories. See, e.g., People v Herron, 464 Mich 593, 604-605 (2001); People v Rode, 449 Mich 912 (1995); People v Datema, 448 Mich 585, 595-596 (1995); People v Edwards, 429 Mich 450, 477 (1988); People v Ryczek, 224 Mich 106, 110 (1923). Because, even viewing the facts in the light most favorable to the prosecution, Mr. Brayman's acts did not meet any of these legal definitions of manslaughter, affirming his conviction for manslaughter would require a retrospective change of law that is unexpected and indefensible in view of the prior law. It would also seem "erratic or arbitrary," Stevenson, supra, after many years of holding to the Ryczek formulation – and after reinstating the defendant's convictions in Rode because his view of the law of manslaughter was wrong as a matter of law – to now reverse the Court of Appeals and reinstate Defendant Brayman's conviction because this Court has changed its mind as to what the law should be.

B. **INVOLUNTARY MANSLAUGHTER WAS NOT AN APPROPRIATE CHARGE AT THE TIME OF THE ACTS IN QUESTION HERE BECAUSE THE LAW DELINEATED THE OFFENSE INTO THREE DISTINCT CATEGORIES: GROSS NEGLIGENCE MANSLAUGHTER REQUIRED A LAWFUL ACT; MISDEMEANOR-MANSLAUGHTER REQUIRED NON-FELONIOUS, NON-INHERENTLY DANGEROUS CONDUCT; AND "FAILURE TO ACT" MANSLAUGHTER REQUIRED THE EXISTENCE OF A LEGAL DUTY.**

At the time of the acts here, and for the last eighty or so years, it has been clear that involuntary manslaughter is divided into three distinct species:

> "the killing of another without malice and unintentionally, but in doing some unlawful act **not amounting to a felony nor naturally tending to cause death or great bodily harm**, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." People v Ryczek, 224 Mich 106, 110 (1923) (emphasis added).

This formulation has been consistently adhered to by this Court. People v Herron, 464 Mich 593, 604-605 (2001); People v Clark, 453 Mich 572, 578 (1996); People v Rode, 449 Mich 912 (1995); People v Datema, 448 Mich 585, 595-596 (1995); People v Edwards, 429 Mich 450, 477 (1988); People v Richardson, 409 Mich 126, 136 (1980); People v Townes, 391 Mich 578, 590 (1974). Which species of manslaughter is at issue determines the proofs required: "failure to act" cases require a showing of legal duty and gross negligence in failing to perform that duty; unlawful act cases require a showing that death was caused in the course of a misdemeanor which was not inherently dangerous[1]; and, even where one acted otherwise lawfully, manslaughter could be made out on a showing of gross negligence.[2]

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[1] For clarity and ease of reference, the phrase "inherently dangerous" will be used throughout as shorthand for "naturally tending to cause death or great bodily harm."

The evidence of manslaughter here was insufficient because it did not fit any of these three categories. Thus, whatever offenses arguably arose from the acts here, involuntary manslaughter was not one of them. Plainly, this is not a "failure to act" situation, as there is no serious contention that Mr. Brayman had a legal duty toward the decedent. Likewise, as the Court of Appeals correctly held below, this was not gross negligence manslaughter because no lawful act was involved, nor was it a case of "misdemeanor manslaughter," as Mr. Brayman was either not guilty or guilty of an inherently dangerous felony.

Gross Negligence Manslaughter

In People v Rode, 449 Mich 912 (1995), this Court reversed the decision of the Court of Appeals and reinstated a defendant's convictions of second degree murder and felony firearm. This Court explicitly adopted the opinion of the dissenting judge in the Court of Appeals. In doing so, this Court re-affirmed the three-category definition of involuntary manslaughter set forth in Ryczek. Rode, 914, n 3. More specifically, the basis of this Court's opinion was, as set forth in that Court of Appeals dissent, that the defendant's conduct could not constitute manslaughter "**as a matter of law**." Id., 914 (emphasis added). The Court of Appeals dissent did not merely opine that the act could not be a violation of the misdemeanor-manslaughter rule, but rather that the act was unlawful and, therefore, could not constitute involuntary manslaughter **at all**. The Court of Appeals dissent specifically pointed out the trial court's error in confusing the "misdemeanor-manslaughter" species of manslaughter with "gross negligence" manslaughter, which necessarily involves "some lawful

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[2] That the legal categories are conceptually distinct does not necessarily mean that the facts always will be. If the facts would support arguments under more than one of the three categories, then prosecution on such theories would be appropriate. See Datema, 448 Mich at 596.

act, negligently performed." Id., 914. Since the act was unlawful, it could not fit within the definition of "the commission of some lawful act, negligently performed." Id., 915.

If the prosecution's position were the law at the time of the offenses, the jury would have been entitled to convict the defendant of gross negligence manslaughter for a malum in se unlawful act. In that case, the Court of Appeals dissent could not have concluded that the error was harmless as it did, because the majority's position would have been well-taken:

> 1) the instruction was erroneous because it precluded a finding of gross negligence for an inherently dangerous act, so,
>
> 2) absent that erroneous instruction, jurors would have been more likely to convict of involuntary manslaughter because they would have realized that they **could** do so where the conduct necessarily involved an inherently dangerous felony.

If the prosecution were correct, then, the jury both here and in Rode could have convicted of gross negligence manslaughter for an inherently dangerous felonious act, and the jury was erroneously instructed to the contrary. It could not be more clear that, since this Court rejected that possibility, the law did not support the use of a manslaughter theory by the proponent (the defendant in Rode and the prosecutor here).

Conspicuously absent from the prosecution's brief is any attempt to address Rode. The entirety of the state's brief amounts to the suggestion that Rode was wrongly decided by this Court – that the decision was absurd, even – and that this Court should overrule Rode. Whether this Court chooses to do so or not, however, should have no impact on the result for Mr. Brayman, as no lawful act – or even an act which was merely malum prohibitum – was even arguably at issue.

The strict application of the Ryczek categories was also reinforced in People v Edwards, 429 Mich 450 (1988). There, the defense had argued that proof of the absence of a felony was no longer

a requirement after People v Aaron, 409 Mich 672 (1980). Though the court in Edwards did not address that defense claim, it found that a manslaughter instruction could not be read because the defense could not prove the absence of an inherently dangerous act. Id., 476-477. To be precise, because it was untenable to claim that the act in question did not naturally tend to cause death or great bodily harm, "the unlawful act in this case could not meet the definition of involuntary manslaughter." Id., 477. This Court continued to rely upon Edwards as recently as 1995 in Rode, supra. Since it is similarly not even arguable that the act in question here amounts to anything but an inherently dangerous one, Edwards also rejects the prosecution's view of the law.

The Misdemeanor-Manslaughter Rule

Although this theory is not really at issue because the prosecution did not proceed under it at trial, the prosecution now claims that the defendants can be found guilty under the misdemeanor-manslaughter rule. Of course, this category of involuntary manslaughter is also unavailable on the facts of this case, most notably under Rode. The Court of Appeals majority in Rode found the trial court instructions erroneous because they suggested that gross negligence only applied to acts which were not inherently dangerous. The majority demonstrated its belief that gross negligence **could** apply to inherently dangerous acts, noting that, if "correctly" instructed, the jury could have convicted of manslaughter for an act the majority described as an inherently dangerous one. Rode, 914, n2. The Court of Appeals dissent, adopted by this Court, found that the conduct could not be manslaughter because it was an **unlawful act which was both a felony and inherently dangerous**, therefore not subject to the misdemeanor-manslaughter rule. Id. Just so here.

To the extent that the prosecution has identified a gap in coverage in the legislative scheme, what it is really suggesting is that this Court should fill in that gap.[3] Only after that gap is filled, however, could liability for manslaughter be extended to one who causes death during an inherently dangerous felony.

"Overproof" and the Mistaken Assumption of the Windfall Acquittal

While portraying the defendants as seeking a "windfall acquittal" (P Brief, 18) has undeniable emotional impact, this case does not present such a situation. Likewise, despite the rhetorical appeal, this case is not about the state proving "too little" by proving "too much." (P Brief, 14). Rather, it is about respect for the rule of law. The notion that these defendants were really guilty of murder and only seek to get a break is deeply flawed for several reasons.

In the first place, this case is really about recognizing that a criminal offense is what it is legally defined to be – no more, no less.[4] This Court's decisions in People v Cornell, 466 Mich 335

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3 It is not clear that this Court would have authority to do so. Felony-murder is prohibited by statute. MCL 750.316. Misdemeanor-manslaughter is one of three types of involuntary manslaughter prohibited under the common law. Ryczek, supra. There are other legislatively created types of manslaughter, see, e.g., MCL 750.322 (willful killing of an unborn child by injury to the mother); MCL 750.323 (the killing of a quick child by use of medicine or an instrument); MCL 750.329 (killing committed without malice by means of an intentionally aimed firearm), as well as other legislatively proscribed homicide offenses. See, e.g., MCL 257.602a (fleeing and eluding causing death); MCL 257.617 (fleeing the scene of a serious personal injury accident causing death); MCL 257.625 (OUIL causing death); MCL 257.904 (driving with suspended license causing death); MCL 750.324 (negligent homicide); and MCL 752.861 (careless discharge of a firearm causing death). The legislature has even gone so far as to specify which of these homicide offenses can be multiply punished. MCL 769.36. It would seem that if Michigan is to broadly expand the misdemeanor-manslaughter rule to include inherently dangerous felonies, that decision should be a legislative one, as would be the terms, conditions, and extent of such a rule.

(2002) and People v Mendoza, 468 Mich 527 (2003), enshrine for all offenses a principle that has long been applicable to manslaughter and other previously termed "cognate lesser offenses": the notion that a jury may only be instructed on offenses that accord with a rational view of the evidence. Fundamentally, the "rational view of the evidence" model posits that not all possible legal outcomes are factually plausible, or acceptable, in a criminal case. When one is convicted of an offense inapplicable to his situation, the rule of law suffers. In "all or nothing" cases, conviction of an intermediate offense that does not fit the facts either does injustice by over-punishing the innocent defendant or disserves society and defeats legislative intent by under-punishing the guilty.[5] "Over-proving" a case only saves the prosecution where the facts would arguably support **both** the greater and lesser offenses. Otherwise, where logic dictates that it is either the greater offense or none at all, the claim of having "proven too much" is no more than an admission that the prosecution has sought conviction on an inappropriate offense.

At base, then, whether or not the prosecution must prove a negative element to make its case to a jury is a non-issue. If, as a matter of law, the situation only describes one of two included offenses, a prosecutor may not obtain a conviction on the inapplicable theory, nor may either side obtain a lesser offense instruction on such grounds. The prosecution's misreading of Mendoza is instructive. The prosecution claims that, since Mendoza held manslaughter to be a necessarily

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4 Hyperbole aside, the Court of Appeals here did not hold that the act in question was not a homicide at all. (See P Brief 14, 18). Homicide is "the killing of one person by another." Black's Law Dictionary (7th Edition), p 739. It does not necessarily imply unlawful conduct. Id. The absurdity **would** leap from the page if the court held that death was caused by human agency, yet that this did not amount to a homicide. In this case, however, the Court of Appeals held not that there was no human agency involved, but rather that the homicide did not fit the legal definition of manslaughter. (19a-20a).

5 Our system does acknowledge a jury's power to dispense mercy de facto by rendering an irrational verdict when it determines that the community is best served by conviction of a less severe offense, but such a result is not to be affirmatively encouraged or sanctioned de jure. See United States v Dougherty, 473 F2d 1113, 1130-1137 (CA DC, 1972). See also People v Ward, 381 Mich 624, 628 (1969); People v Demers, 195 Mich App 205 (1992).

included offense of murder, if murder would be an appropriate charge here, there must be sufficient evidence of manslaughter. (P Brief, 18). Even assuming for the moment that murder would have been an appropriate charge here, Mendoza does not hold that manslaughter instructions are required in **all** murder prosecutions. Rather, an instruction on manslaughter may be read only if supported by a rational view of the evidence. Mendoza, 542, 546-547; Cornell, 466 Mich at 357.

The "windfall acquittal" theory also fails for a second reason: the assumption that only the defense had something to gain from this situation is unwarranted. The prosecution stood to gain something by choosing to prosecute for manslaughter rather than murder, and this would seem to be a classic case of trial strategy. Given the paucity of the evidence (certainly with respect to Mr. Brayman) and the almost palpable sense that no one involved believed that Reid would die, the prosecution clearly felt that it could not successfully prosecute some or all of the defendants for second degree murder. It was a calculated risk to chance appellate reversal by charging an inapplicable offense, but apparently worth the payoff: increasing the odds of a jury conviction by charging a more palatable offense. There is no reason to strongly presume that trial defense attorneys act on the basis of clever and calculated strategic thinking, but that trial prosecuting attorneys do not. See People v Toma, 462 Mich 281, 302 (2000) (ineffective assistance of counsel); People v Mitchell, 454 Mich 145, 156 (1997) (same). Given that the odds are heavily stacked in the prosecution's favor once a jury conviction has been obtained, it would seem an effective strategy. However, as is the case in prosecutions based on insufficient evidence generally, when the prosecution charges an inapplicable offense, it is stuck with the aftermath of that decision. See People v Randolph, 466 Mich 532 (2002) (conviction of robbery vacated where appropriate offenses were larceny and assault, the latter being uncharged). Win or lose on appeal, putting itself

in a position to win in the court of public opinion (which does not always value the nuances of the law) may have value for the prosecution as well.

Finally, the prosecution overstates the possibility for "windfall" acquittals in another way. Where, as here, the defendant is charged with an inherently dangerous felony, the law already sets forth a specific mental state element that must be met in order to convict. The "unlawful act" in question here was an alleged violation of MCL 750.436(1). Under that statute, Mr. Brayman is culpable if he "willfully mingle[d] a poison or harmful substance with a. . . drink" and if he "[knew] or should [have known] that the. . .drink. . .may [have been] ingested or used by a person to his or her injury." MCL 750.436(1).[6] No "windfall" arises. Mr. Brayman would be guilty to the extent that he acted to willfully mingle a harmful substance in drink if he knew or should have known that it could be ingested to someone's injury – no more, no less. Where the facts do not fit the legal definition of manslaughter, but arguably fit the definition of an inherently dangerous felony, it is not appropriate to allow a vague standard of "gross negligence" to confound the inquiry under the specific statute designed to address the concerns presented by the alleged facts.

Nor is the prosecution's reliance on People v Datema, supra, availing. Since Rode is this Court's last word on the definition of manslaughter, and was effective before the offenses here, any purported conflict with Datema is meaningless, as Rode controls. Nevertheless, Datema, too applied the Ryczek formula to the facts before it to hold:

> "Pursuant to the definition of involuntary manslaughter set forth in Ryczek, defendant's conduct in this case would fulfill the common-law misdemeanor-manslaughter theory of liability: the crime of battery **is not a felony, and** as defined at common law, it **was not an inherently dangerous offense**. Unlike the second and third theories of involuntary manslaughter liability, the

[6] The prosecution could have elected to proceed under MCL 750.436(2), for poisoning from which death results, and for which the penalty is life or any term of years, if it believed it could obtain a conviction under subsection (2).

misdemeanor-manslaughter rule does not require negligence." Datema, 600 (emphasis added).

In no way does Datema stand for the proposition that a gross negligence theory is appropriate in a case where the act in question was an inherently dangerous felony.[7] Taken together, this Court's decisions in Rode, Datema, and Edwards, make clear that, at very least, gross negligence manslaughter does not apply to cases involving unquestionably malum in se unlawful acts, particularly, as here, inherently dangerous felonies.

The indisputable truth about this case is that Mr. Brayman was guilty of an inherently dangerous felony, or not at all. A rational view of the evidence does not support a conviction for manslaughter, as that offense has been defined in Michigan for decades. This specific point was made in decisions of this Court that controlled at the time of the acts here. People v Rode, supra; People v Edwards, supra. There was insufficient evidence of manslaughter here because the offense the prosecutor chose did not fit the facts. Whether the appellant regrets that strategic choice is beside the point. The rule of law must be respected and the Court of Appeals decision affirmed.

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[7] The prosecution also places great reliance on People v Austin, 221 Mich 635 (1923). Not only is Austin superseded by Rode, but it even precedes Ryczek. At best, Austin describes the law before Ryczek and does not change the reality that the prosecution's theory is an unexpected and indefensible departure from the law that has stood for many years. It is otherwise clear, however, that Austin is at odds with established law and of dubious precedential value. According to Austin, a homicide is manslaughter "where death as a result is so remote a contingency that **no reasonable person could have taken it into consideration** when administering the poison and **could not have contemplated that death would result**. . . ." Austin, 644 (emphasis added). This cannot possibly reflect the law, however, because one must proximately cause death to be guilty of manslaughter. Datema, 599; People v Rockwell, 39 Mich 503 (1878). Yet, for the act to have proximately caused death, "the harm must be a foreseeable risk of the defendant's conduct." People v Tims, 449 Mich 83, 105 (1995) (citing Rockwell).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court **AFFIRM** the holding of the Court of Appeals and **VACATE** his conviction for manslaughter. If it does not do so, this Court should remand to the Court of Appeals for consideration of any issues it failed to reach in light of its decision.

Respectfully submitted,

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